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NO. 95-718

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RUDOLPH ALBINO,
Respondent

Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The facts material to the question presented have been set forth in the Petition for Writ of Certiorari. Petitioner files this Reply Brief in response to respondent's Brief in Opposition.

REPLY TO POINTS RAISED IN BRIEF IN OPPOSITION

In its certiorari petition, petitioner noted that this case warrants review because it provides the Court with an opportunity to give national guidance on the practical meaning of probable cause in a common and problematic context -- the typical street corner drug deal. Petitioner also noted that this case was particularly appropriate for consideration because the decision below is wrong, unexplained, and conflicts with the conclusions reached by other state and federal courts facing similar questions.

Respondent makes two arguments in response. First, he accuses petitioner of misrepresenting a material fact. Next, he claims that review is unwarranted because Pennsylvania cases in this area supposedly are remarkably consistent and easy to apply, and because the question of probable cause is fact-specific. These claims are not true. More importantly, respondent's arguments do not remotely diminish the importance of the question presented, or the necessity for this Court's review.

A. Respondent's accusation that Petitioner misrepresented a fact is both false and irrelevant to the question presented for review.

Respondent first attempts to divert the Court's attention away from the issue presented by pretending that the certiorari-worthiness of the case depends upon resolution of a factual dispute. Specifically, respondent accuses petitioner of misrepresenting the facts in stating that the arresting officer was able to ascertain that respondent was selling "whitish" or "non-descript" colored objects.

Respondent's accusation begs the question. The importance of the issue presented, and the necessity for this Court's review, does not turn on whether the officer could "ascertain" the color of the objects. What is important is the commonality of the question presented: the specific facts being whatever they were in this commonly litigated area, did the officer have probable cause to believe he had just seen a drug deal?

That question is raised on a daily basis in courtrooms throughout the nation. It is arguably the most litigated and important Fourth Amendment question of the day. It arises in a myriad of factual circumstances: an officer may or may not be able to detect the color of the object, or the size of the object, or distinctive packaging, etc. These factual variations in no way diminish the importance of the question.

To petitioner's knowledge, this Court has never considered the question of probable cause in this commonly-litigated area. Nor has the Court had an opportunity to provide much practical guidance on

questions of probable cause generally. This case plainly provides this Court with an opportunity to consider what is arguably the most pressing Fourth Amendment question of the day, and thereby to provide further practical guidance on the meaning of probable cause itself.

In addition to being a red herring, respondent's attack on petitioner's presentation of the facts is baseless. Far from "misrepresenting" the factual record concerning the color of the object sold, petitioner quoted the court's finding: e.g., the objects were "on the line of whitish, or non-descript, as opposed to having a particular color." App. 72-73; see Pet. for Writ of Cert., 10. It is difficult to understand how respondent can characterize a verbatim quotation as a "misrepresentation."[1]

Moreover, the suppression court's finding respecting the color of the objects is significant, as it excludes every non-white color in the spectrum. As respondent concedes, crack cocaine is a whitish substance. The color of the objects thus fully supported the officer's belief that respondent was selling cocaine.

Petitioner, in short, was meticulously accurate in reciting the operative facts.[2] Respondent's present,

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[1] Respondent's claim that the suppression court disbelieved the officer's testimony is false. The suppression court specifically stated its acceptance of that testimony "as the facts of the case." App. 72-73.

[2] The counselled respondent's misrepresentations go well beyond mere advocacy, as he adds a gratuitous attack on the arresting officer and petitioner. Brief in Opp. 13 & n.7. These accusations are premised solely on respondent's own false rendition of the suppression court's factual findings.

groundless accusation is nothing but a rather transparent attempt to divert this Court's attention from the importance of the underlying Fourth Amendment question.

B. Review of the question presented here would provide much-needed national guidance on the practical meaning of probable cause.

Respondent next argues that this Court should decline review because Pennsylvania cases in this area supposedly are remarkably consistent and easy to apply, and because the question of probable cause is always too fact-specific to be worthy of review. Both of these claims are unpersuasive.

Respondent's portrayal of the Pennsylvania cases as consistent and principled is insupportable. As petitioner demonstrated in its petition for a writ of certiorari, the recent decisions of the Pennsylvania Supreme Court in this area not only are impossible to harmonize with each other, but are difficult to defend in their own right under any rational approach to probable cause.

Tellingly, respondent himself has acknowledged in this very case the lack of clarity in the law. Respondent lost in the intermediate appellate court, which found probable cause. Respondent then sought discretionary review in the Pennsylvania Supreme Court, arguing that such review was necessary to, inter alia, "provide guidance to the trial courts in [sic] this commonly recurring issue." Pet. for Allowance of Appeal from the Superior to the Supreme Court, 8. The necessity for guidance is no less pressing merely because respondent prevailed in the most recent round of litigation. In fact, since the Pennsylvania Supreme Court chose not to articulate the reasons for its decision, there is an even greater need for guidance now.

Indeed, even justices of the Supreme Court of Pennsylvania do not agree with respondent's new-found assessment that Pennsylvania formulations of probable cause already "have provided as much guidance and consistency as is judicially possible." Brief in Opp., 29. To the contrary, in his recent dissenting opinion in Commonwealth v. West Jones, ___ A.2d ___ (Pa. 1995), No. 3 W.D. App. Dkt 1995 (filed 11/28/95), Justice Cappy, joined by Justice Flaherty, noted that, "[t]he question of what quantum of information is sufficient to establish probable cause has long plagued the judiciary." In short, neither respondent nor the court below could seriously dispute that this Court's discretionary review would be both appropriate and enormously helpful in this area.

Respondent also is mistaken when he asserts that review of this case will be a "tedious" exercise of applying the law to the facts which will not even help to provide "national consensus" on the question of probable cause. Brief in Opp., 28-29. It is not at all apparent why an important constitutional question is undeserving of review merely because it requires an examination of factual circumstances. Whenever difficult-to-describe constitutional standards, such as probable cause, are at issue, the only way to provide guidance is for the Court to provide examples: i.e., "these facts establish probable cause, while these do not." Absent such explication, the "standard" becomes meaningless.

This Court recently has reaffirmed the importance of case-by-case elaboration when constitutional rights and limitations are implicated. Indeed, such a review "may more accurately be described as law declaration than as law application". Thompson v. Keohane, 116 S. Ct. 457, 467

(1995), citing Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 273-276 (1995).

The need for such a declaration is apparent here. The meaning of probable cause is the single most important question under the Fourth Amendment. It is raised and litigated in the context of street drug sales on a daily basis in courtrooms throughout the nation. The unexplained decision of Pennsylvania's highest state court below -- which is thoroughly out of step with the decisions of other state and federal courts which have ruled upon similar questions -- bears witness to the need for guidance from this Court on the question. The need for, and national benefit from, review could not be more apparent.

CONCLUSION

For these reasons, as well as those stated in the petition for writ of certiorari, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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